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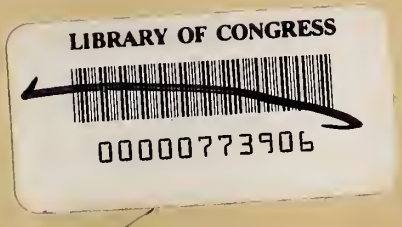

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Calendar No. 573

76TH CONGRESS, 1st Session | SENATE | REPT. No. 532, PART 2

TO PROHIBIT AND TO PREVENT THE TRADE PRACTICES KNOWN AS COMPULSORY BLOCK BOOKING AND BLIND SELLING OF MOTION-PICTURE FILMS IN INTERSTATE AND FOREIGN COMMERCE

JUNE 7 (legislative day, JUNE 5), 1939.—Ordered to be printed

U.S. Congress. Senate.

Mr. SMITH, from the Committee on Interstate Commerce, submitted the following

MINORITY VIEWS

[To accompany S. 280]

The minority does not concur with the majority report on S. 280 submitted by Mr. Neely, from the Committee on Interstate Commerce, to whom was referred the bill (S. 280) to prohibit and to prevent the trade practices known as compulsory block booking and blind selling of motion-picture films in interstate and foreign commerce.

It is our opinion that this bill, as a control over the licensing of motion pictures, is not necessary. Our judgment is that no injury to the commerce of the United States in the licensing and distribution of motion pictures warrants legislation that will result in radically altering a system that has proven to be economical and practical to all three branches of the industry.

We are of the opinion that the enactment of this bill into law would result in decrease of employment both in production and distribution and an increase in cost to the theater owner and the public.

The subcommittee of the Committee on Interstate Commerce held public hearings on the bill from April 3 to April 17, 1939. The record of these hearings, printed for the use of the Committee on Interstate Commerce, covers 651 pages. Immediately after the record of the subcommittee hearings were printed, a majority of the Committee on Interstate Commerce voted to report the bill to the Senate. Senator Neely has submitted a report favoring the bill.

Of the 48 witnesses who came to Washington and appeared before the subcommittee during the hearings on the bill, the record shows that 34 testified in opposition to the bill and that 14 were in favor of it. All of the witnesses from the motion-picture industry who appeared at the hearings, except the 5 spokesmen for an organization known

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as the Allied States Association of Motion Picture Exhibitors, denounced the bill and its provisions as harmful and destructive to the operation of their business. All of the other witnesses that appeared before the subcommittee, except the 9 that are alined with the Motion Picture Research Council, Inc., which is the organization sponsoring the bill, opposed it either because they were convinced it would accomplish no useful purpose, or because they were convinced it would prove to be a serious detriment to the public and to those who are trying to raise the standards of motion pictures. Fair consideration of the merits of the bill, it would seem, would require some examination of the testimony registered against the bill.

Motion pictures, like all entertainment, and particularly theatrical entertainment, by their very nature invite criticism. With the continuous stream of film that pours out of the studios all year it is not surprising that anyone can easily find items that he or she may dislike the number and proportion of such items depending upon personal taste and critical attitude as much as upon the quality, artistic standards, or popular appeal of the motion pictures. Much of the testimony presented to the subcommittee in support of the bill consisted of general, and some specific, criticism of motion pictures as mass entertainment.

Yet there is nothing in the bill that prohibits or declares unlawful the showing of any of the motion pictures or types of motion pictures that are thus criticized, nor of a motion picture that is clearly immoral or indecent. It was pointed out at the hearings that the worst type of sex and vice exposé pictures that have been shown in the past could easily comply with all of the provisions of this bill as they are invariably sold one at a time, not in blocks, and only after the picture is fully completed and ready for screening. In other words, it appears to be undisputed that there is no compulsory block booking or blind selling in the distribution of this type of offensive motion picture. It is also undisputed that this type of picture is not produced or distributed or exhibited by the companies referred to as the Big Eight.

A vast amount of the testimony by the proponents of the bill at the hearings was devoted to criticism of motion pictures made and exhibited in the past, many of them years ago, of the titles of the motion pictures that are used to excite interest and allure patrons into the theaters, and of analyses prepared 7 years ago, on motion pictures produced prior to that date, to demonstrate the harmful effect of moving pictures on children and morons. This criticism and denunciation of motion pictures is of no importance in considering the question presented by this bill, unless it can be shown that the bill as applied under penalties to the motion-picture industry will bring about an improvement in the motion pictures produced and exhibited, and without seriously damaging the business in other ways. The testimony of those who have had practical experience in the business is almost unanimous that the specific provisions of the bill presented, enforced under penalties as proposed, will do nothing but damage to the quality and standards of the motion pictures produced and exhibited, and will serve no useful purpose.

The sponsors of the bill state:

> The primary purpose of the bill is to establish community freedom in the selection of motion-picture films. A secondary purpose is to relieve independent interests in the motion-picture industry—producers, distributors, and exhibitors—of monopolistic and burdensome trade practices.

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No quarrel with the mere statement of such purposes is possible. It appears from the testimony that many of the organized public groups who have been persuaded to endorse the bill relied entirely upon this statement of purpose without attempting to analyze or understand the enforceable sections of the bill upon which the carrying out of these purposes depend. It is not surprising that these earnest people should be in favor of the stated purposes set forth in the first section of the bill. It is our responsibility in voting upon the bill to examine the more important sections, however, that will be applied to this industry under penalties by the bill.

It should be realized that this bill if enacted as a Federal statute will apply to all motion pictures, those that receive the highest praise as well as those which the witnesses testifying in favor of the bill seek to criticize, and to all producers, distributors, and exhibitors of motion pictures, regardless of whether their business conduct is good or bad, subject to criticism or praise. Moreover, the charges of monopolistic and burdensome trade practices are subject to proof in the courts, which have adequate facilities for weighing evidence and testimony of this nature and the power to correct any abuses found, and such charges and complaints are being tried in court actions constantly. It is not contended that the present laws are defective to prohibit monopolies.

The discussion with regard to these purpose must therefore center about questions of what may be deemed fact; namely, is there an absence of "community freedom" in the selection of motion pictures today? Are exhibitors oppressed by a burdensome and monopolistic trade practice from which they should be relieved?

The phrase "community freedom of selection" in relation to motion pictures shown throughout the land, and throughout the world, is a slogan; a catchword. The proponents of the bill in connection with this slogan have offered other appealing slogans and catchwords. For instance the statement that "the bill is founded on the American principle of home rule," and to the effect that centralized control of education is repugnant to the American public, that public schools are indigenous to the local communities which they serve; and that motion pictures are an important medium of education, from which the proponents conclude that the industry should come under the regulations of the bill. The fault is not in the concepts, but in the reasoning to support the conclusion asserted.

Slogans and phrases should, before being accepted as conclusive, be examined and analyzed to see what they have as their inarticulate premises. Nowhere in the testimony of the many witnesses before the subcommittee is it claimed that at present there is in fact no "community selection" or no "home rule" in motion-picture entertainment, nor is there attempted an appraisal of how much there is of whatever is meant by these labels and how much there is not. This is of first importance in connection with the stated purpose of the bill. Only by inference does it appear that there is in fact an absence of "community selection" or of "home rule" in motion-picture entertainment.

The sponsors do not claim that the people of the community are forced or compelled to attend motion-picture theaters to the exclusion of other forms of entertainment offered, or that they are compelled to attend at any particular performance, or compelled to attend at any

particular theater. It is usual in all communities of the United States, even in the very smallest, that there are several theaters. What then is meant by the phrase "community selection"? The word "community" is not defined. One can suppose that a particular motion picture which is seen by about 40,000,000 people in the United States under no compulsion to see it and is then shown to people throughout the world, in the cities and villages of all the English-speaking countries, of the Spanish-speaking countries, and of the Orient, has for its community all of the people who have seen fit to attend its showing. Certainly it would be wrong to say that such community has been brought about by any method designed by the distributor of the motion picture to negative "community selection."

Motion pictures of course are not made for showing in any given small geographical area. They are made for showing in many areas throughout the world. The proponents of the bill cite Mr. Walter Lippmann, who thinks the universal and common appeal of motion pictures proceeds from the fact that the American producers seek the largest common denominator in the public taste. It is true that pictures are made with an appeal greater than that afforded by any single geographical community, but that in itself does not mean that any community is deprived of "community selection" in its motion-picture entertainment. In fact, no one community has a definitely ascertainable preference in motion pictures, or if one has, there would not be enough motion pictures to meet such particular preference. It may be, for example, that so-called action or western motion pictures are commercially profitable because they are more attended in one geographical area than they are in another, but nevertheless these and all other motion pictures must be made for larger patronage than is afforded by any single area. The fact as brought out by the testimony of exhibitor witnesses on both sides is that there is no single indicated community preference for motion pictures. Preferences seem to cut across geographical areas in the United States and across State and National boundaries and oceans. Even in the same family there are persons who have widely varied tastes in the motion pictures they prefer. Indeed it is the experience of people in the business of motion pictures that in the same evening a family will split up, several going to one theater to view a picture showing there, the others going to another theater to view a different picture.

The argument made by the sponsors of the bill in respect to its stated primary purpose proceeds from the claim that the exhibitor is "the logical and only point of contact between the community and the motion-picture industry" and from a definition it makes of "compulsory block booking" and of "blind selling," two other slogans and catchwords, rather than precise and fair descriptive terms of customary practices in the distribution of motion pictures.

The idea must be emphatically rejected that the exhibitors in any city, town, or village are the "only point of contact" between the people resident therein and the motion-picture industry. The motion-picture industry, particularly at its source, that is in the production of motion pictures, has much contact with public and religious organizations truly representative of the people for whom motion pictures are made, which contacts do more to influence the content of motion pictures than the individual statements some patrons may make to the proprietor or manager of a motion-picture theater. Other

influential contacts are the newspaper editorial comment and press criticism and of course the compelling approval or disapproval that is evident from patronage or the lack of it.

Exhibitors, as points of contact between motion pictures produced and motion pictures shown in theaters, cannot make people go to see any particular motion picture. In all but the very smallest places in the United States, all of the motion pictures produced are shown among the theaters which serve any given area. The problem of selectivity for different persons in any given community is met entirely by the achievement of an industry which makes available all over the United States expensively produced motion pictures at a low cost which permits their display at all places, and gives the public so many pictures to choose from.

The sponsors of the bill assume that "each of the eight major (leading) producer-distributors leases to the exhibitors during each recurrent selling season its production of pictures for the ensuing year in large blocks—often the entire output, thus affording the exhibitors no choice but to take all of the pictures offered, or none."

What are the facts in connection with this charge that exhibitors must take all or none of the motion pictures produced and distributed by each of the leading companies? Several of the leading distributing companies compiled and put in the record of the hearings before the subcommittee (see pp. 268 to 271 and 303 to 305, inclusive), complete tabulations of the number of accounts or theaters that licensed and exhibited each of the feature pictures released by the company during the most recent 12 months playing season for which the figures are complete. The facts flatly refute this assumption of the sponsors of the bill, and are not contradicted.

C. C. Pettijohn, general counsel for the Motion Picture Producers and Distributors of America, testified in connection with these tables:

> At the hearings on this bill before the House committee on March 25, 1936, I put in the record schedules showing the number of theaters that played each of the pictures released by Paramount and Twentieth Century-Fox in the 1933–34 playing season. These lists appear on pages 444 to 447 of the printed record of the House hearings, which were printed and available in 1936. As I pointed out before, the records of the Senate hearings held at the same time were not printed until 2 years later, 1938, after this bill had been reported out by the Senate subcommittee.
>
> These schedules show that during the season Paramount sold, made, and released 57 feature pictures. One picture played 11,558 accounts. That picture was Mae West in I'm No Angel. The second largest number of showings was secured for Shirley Temple in Little Miss Marker; third, for Bing Crosby in Too Much Harmony; fourth, for We're Not Dressing; and, fifth, Mae West again in Belle of the Nineties. Each of these played over 9,000 accounts.
>
> In the same block or group sold by Paramount for the 1933–34 season His Double Life played 3,977 accounts; The Great Flirtation played 4,481 theaters. Yet the same company in the same year made and sold all 57 features. How can anyone claim that compulsory block booking was foisted on all the independent exhibitors that year by Paramount?
>
> The same year the record shows that Fox made, sold, and released 51 features. The picture that played the largest number of accounts in their group, or block, was Will Rogers in David Harum, which played 10,792 theaters. Shirley Temple in Baby Takes a Bow was next, in 10,257 accounts. Will Rogers in Handy Andy was third, then Carolina, a big special.
>
> Mae West, Will Rogers, Shirley Temple—all big box-office attractions. That is what they want. That is what the record shows. One of them is as clean as a hound's tooth and the other social groups were blasting all over the country. Mae West leads one and Will Rogers the other. You talk about what the exhibitor will do, Senator. They buy box-office attractions. That is what the record shows.

The pictures that were played by the least number of accounts in the Fox group of 51 that year were the Constant Nymph, Heart Song, and J. B. Priestley's famous book, the Good Companions, which was only shown in 2,026 theaters altogether.

Now, I would like to put in the record some similar schedules of the national distributors for the pictures they made, sold, and released for the most recent releasing years for which the figures are complete. Until the contracts were played out, such figures cannot be compiled, of course, as these are the figures for the 1937–38 releasing season; that is, all of the pictures released by each company in the 12 months starting August 1 or August 15.

These schedules show a very wide variation in the number of theaters that show the different pictures released in the same group block by the same company. If they are sold by compulsory block booking, most theaters must have a big cancelation privilege. If not, then most of the theaters must have a very wide selection when they buy.

Actually, exhibitors have a variety of ways to get out of playing a picture. They may cancel it by the 10-percent clause in their contract. They may have a selective contract, that is, buy 40 out of 50, the 40 to be selected as they are released. They may persuade the distributors to cancel a picture by mutual agreement, by bargaining and trading. Or they may just refuse to play it and defy the distributor to make them use it. But by one or more of these methods, it is quite obvious that most theaters do get out of playing certain pictures of every company, otherwise every picture from the same company in the same year would play the same number of accounts.

Now, on community selection: What is community selection of motion-picture films? Let us be sure what we are discussing. From their own testimony it appears that the proponents themselves have different ideas.

To the exhibitor it means a picture which the greatest number of people will come to see.

To the representatives of women's clubs and welfare groups it means the picture that they think the people should see.

To the general public it means a free choice to see any picture that it wants to see.

Thus it is obvious that while they are using the same terms, the three groups are talking about three different things.

The facts concerning the selection of motion pictures now secured by the theaters in the United States as brought out in this testimony shows the following variations between the number of theaters that exhibited the feature picture with the widest circulation and the feature picture with the smallest circulation marketed by the same wholesale distributor in the same playing season:

Twentieth Century Fox Film Corporation, 1937–38 playing season.—One motion picture had 12,214 bookings, another motion picture had 3,947 bookings.

RKO Radio Pictures, Inc., 1937–38 playing season.—One motion picture had 9,567 bookings, another motion picture had 845 bookings.

Universal Pictures Corporation, 1936–37 playing season.—One motion picture had 10,567 bookings, another motion picture had 2,315 bookings.

Metro-Goldwyn-Mayer Pictures, 1937–38 playing season.—One motion picture had 10,873 bookings, another motion picture had 5,455 bookings.

Columbia Pictures Corporation, 1936–37 playing season.—One motion picture had 10,298 bookings, another motion picture had 2,006 bookings.

Paramount Pictures, Inc., 1937–38 playing season.—One motion picture had 13,200 bookings, another motion picture had 3,947 bookings.

These facts and figures seem to be conclusive that contrary to the assertions of the sponsors of the bill, the theaters actually have a wide selection of the pictures released and sold by the eight wholesale

distributors of motion-picture films listed as "the Big Eight" by the sponsors of the bill, and are not required to play all or none of the motion-picture films produced and distributed by these companies. Witnesses on both sides before the subcommittee testified that all of the distributing companies regularly engaged in the business, not only the so-called Big Eight but also the other national and regional or "State rights" distributors, sometimes referred to as the independents, sell their motion pictures the same way, that is, with what is branded compulsory block booking and blind selling.

It may be significant to note that since this legislation was first introduced 10 or 12 years ago, and under the "monopolistic and burdensome trade practice" complained of, four new companies have established national wholesale-distribution systems for motion-picture films. These are known as Republic Pictures, Monogram Pictures, Grand National Pictures, and Gaumont British Pictures. None of these new distributors are listed as "the Big Eight."

The charge made by the sponsors of the bill but unsupported by any evidence that the producer-owned theaters freely reject motion pictures without payment therefor in their own theaters, but that this privilege is denied to independent theaters does not explain the wide difference between the number of theaters that exhibit the different pictures in the same distributor's group or program of pictures because it was testified that there are less than 2,500 such producer-owned theaters in the United States, while the differences in the number of exhibitions of the pictures of the various companies were Twentieth Century-Fox, 8,633 theaters; Paramount, 9,253 theaters; RKO Radio, 8,722 theaters; Universal, 8,254 theaters; Metro-Goldwyn-Mayer, 5,418 theaters; Columbia Pictures, 8,292 theaters.

The only definite example given of this practice in any of the testimony before the subcommittee involved certain Paramount pictures booked by the Atlas Theater in Washington, D. C. Following an investigation it was later revealed in testimony by the Paramount resident manager in Washington that the facts were exactly the reverse of the charges made; that the producer-owned theaters were required by their licensing agreements and actually did play or pay for the pictures mentioned, but that the independent exhibitor operating the Atlas Theater had the right to reject the same pictures under his license agreement with Paramount without paying the film rental or license fee, at his own option.

It is not contended that there is "blind selling" of motion-picture entertainment to the public. Both compulsory block booking and blind selling as defined in the bill relate exclusively to the wholesale buying of the exhibition rights to copyrighted motion pictures by the retail dealers who operate theaters. Much confusion is caused by attempts to consider this as a retail transaction. It is nothing of the sort. The only retail transaction in the motion-picture business is the sale of motion-picture entertainment by the exhibitor to the general public or theater patron. The consumer "buys" the motion picture at the box office of the theater, and never at the film exchange or wholesale dealer's place of business. The exhibitor "buys" pictures, not for personal consumption, but entirely for resale to the public at the theater.

There is no complaint that motion pictures are not well advertised and "labeled" to the public by the theater. No theater owner would

think of showing a motion picture without announcing and advertising it in his local community. Every-day experience demonstrates this, if there is any complaint it is that the motion pictures exhibited by the theater are overadvertised to the public.

While it thus can be seen that there may be very serious doubt that the conditions and oppressive practices complained of by the sponsors of the bill actually exist in the motion-picture industry, the important question now presented concerns the specific enforceable provisions of the bill itself. These are contained entirely in sections 3 and 4 of the bill, and should be examined carefully in the light of their effect upon the motion-picture business.

SEC. 3. (1) It shall be unlawful for any distributor of motion-picture films in commerce to lease or offer to lease for public exhibition films in a block or group of two or more films at a designated lump-sum price for the entire block or group only and to require the exhibitor to lease all such films or permit him to lease none; or to lease or offer to lease for public exhibition films in a block or group of two or more at a designated lump-sum price for the entire block or group and at separate and several prices for separate and several films, or for a number or numbers thereof less than the total number, which total or lump-sum price and separate and several prices shall bear to each such relation (a) as to operate as an unreasonable restraint upon the freedom of an exhibitor to select and lease for use and exhibition only such film or films of such block or group as he may desire and prefer to procure for exhibition, or (b) as tends to require an exhibitor to lease such entire block or group or forego the lease of any number or numbers thereof, or (c) that the effect of the lease or offer to lease of such films may be substantially to lessen competition or tend to create a monopoly in the production, distribution, and exhibition of films; or to lease or offer to lease for public exhibition films in any other manner or by any other means the effect of which would be to defeat the purpose of this Act.

(2) It shall be unlawful for any person knowingly to transport or cause to be transported in commerce any motion-picture film which is leased, or intended to be leased, in violation of subdivision (1) of this section.

Section 3 of the bill is designed to deal with so-called compulsory block booking. Subsection 1 of section 3 prescribes the law which a distributor must adhere to when negotiating with an exhibitor for exhibition contracts for more than one motion-picture film. Subsection 2 of section 3 makes it unlawful for any person to transport a motion picture which is or is not intended to be the subject of negotiations or contracts in violation of subsection 1. Section 5 (1) imposes imprisonment not exceeding 1 year, or a fine not exceeding $5,000, or both such fine and imprisonment, on every person who violates section 3.

The provisions of section 3 (1) are substantially identical with the provisions of an order issued by the Federal Trade Commission on July 9, 1927 against one of the large motion-picture producing and distributing companies, but which on review by the Second Federal Court of Appeals was set aside and annulled (1932) (*F. T. C.* v. *Paramount Famous Lasky Corp.*, 57 Fed. (2d) 152).

The section was contained in S. 3012 (74th Cong., 2d sess.) and in S. 153 (75th Cong., 3d sess.). Since its formulation by the Trade Commission it has always been the subject of attack by every distributor of motion pictures on the ground that no distributor could safely offer motion pictures in a group at prices different from the prices at which the several motion pictures may be offered separately, because the distributor cannot know whether such differences in prices make the exhibitor select other films in the group offered in addition to "only such films of such block or group as he may desire and prefer to procure for exhibition."

Since prices for motion-picture films vary with each picture and with each theater in each locality, so much so that one theater may be paying $20,000 for the exhibition rights of a motion picture, while another theater giving a simultaneous exhibition of such motion picture in another area may be paying only $15, it can be readily appreciated that section 3 places its burden on the pricing policy of distributors in negotiating contracts with exhibitors. An important factor is the fact that if a distributor fails to license a motion picture in a given area, he can receive no revenues for that motion picture in that area. Whether a motion picture meets its production costs depends upon the total revenues paid for it by all the exhibitors who contract to exhibit it.

The provisions operative in price negotiations are claimed by the sponsors of the bill to be inserted for the purpose of preventing a distributor from attaining by indirection the result sought to be outlawed; namely, that of refusal to deal with an exhibitor unless he contracts for all offered, but a careful reading of the language must make it plain that the section does more than that. It operates to fix prices at which motion pictures in groups may be offered for contract. The section is complained of as being vague and indefinite and as failing to provide a standard to which the distributors' sales representatives may conform in its application to their negotiations with exhibitors on pain of criminal punishment.

It is singular that although 12 years have elapsed since the language embodied in section 3 was first promulgated by the Federal Trade Commission, despite the attack thereon ever since, no measure has been drafted except in terms identical with that voided by the court. It needs to be appreciated, as the court which reversed the order stated, that its provisions operate in a field of "ordinary incidents of bargaining and negotiating between seller and buyer out of which a contract may or may not result."

The testimony of witnesses before the subcommittee reveals that negotiations between a distributor and an exhibitor leading to contracts for motion-picture films are rare in which the distributor does not seek for at least a portion of the motion-picture films to be licensed at fees or "rentals" which are a specified percentage of the revenues derived at the exhibitor's box office upon the exhibition of such motion-picture films. Obviously a contract for a group of motion pictures in which some of the motion pictures are licensed on a percentage basis cannot be a contract at a "designated lump-sum price for the entire group." But this is not the only reason why motion pictures cannot be said to be either offered for contracts or contracted for at a designated lump-sum price for an entire group. The main reason is that it is the practice of distributors to solicit offers and it is the practice of exhibitors to make offers and conclude contracts for a stated license fee for each motion picture covered by the contract. In rare cases the individual license fee for each picture is the same for each of the pictures covered by the contract. In a great many cases and perhaps the great majority of instances they are not. The most typical solicitation by a distributor relating to a group of motion pictures and the most typical contract mutually agreed upon between a distributor and an exhibitor will have several price classifications for different numbers of motion pictures and normally at least one of the price classifications is one in which a certain number of pictures in the group are licensed on a percentage basis.

These being the facts of trade practices in negotiations for contracts, the provisions of a bill which have application only where a distributor offers for contract or completes a contract for motion pictures "at a designated lump-sum price for the entire block" or group, are futile. It has no meaning.

The first clause of section 3 (1) would put a command upon the salesman of a distributor, if he offers more than one film, not to require the exhibitor party to the negotiation "to lease all such films or permit him to lease none."

Distributors' witnesses testified emphatically that their salesmen do not make any declarations accompanying negotiations with an exhibitor that the exhibitor must take all or none. Nor do they "stand pat" and refuse to license any if an exhibitor refuses to take all. They do seek to persuade an exhibitor to take all of the films they have to offer. It is natural that they should do so, and there is nothing reprehensible in such conduct. The bill's provision insofar as it is applicable to prohibiting a salesman from concluding a deal for more pictures than an exhibitor "wished" to contract for at the outset of the negotiations is aimed at the art of honest salesmanship with which no statutory provision should interfere.

If a salesman offers a group of pictures and the offer is rejected and the salesman refuses to consider the lease of less than the number in such group until the block has been successively offered to the exhibitor's competitors, there is nothing illegal or unfair in such method of negotiation and insofar as the provision would prohibit such conduct on the part of the salesman, it is entirely unwarranted. Clearly a salesman ought to be able to refuse to consider an offer for less than a block of pictures until all possibility of selling a block has been exhausted. The distributor should not be made to forego the right to sell in such quantities as he chooses and be made to sell only in such quantities as a particular customer desires to buy.

The second clause in turn deals with the regulation of prices at which motion pictures may be offered or at which contracts for their exhibition may be concluded, and is apparently designed to prevent a distributor from insisting on an increase in prices or from achieving an increase in prices if individual motion pictures are accepted by the exhibitor. Apparently it seeks to condemn not all increase, but some. How much is not stated. This clause would be operative to control the business conduct of the distributor's sales representatives in negotiations with exhibitors entirely in the area of prices to be quoted or prices to be charged by agreement. It is a price measure and only a price measure.

Legislation which would venture into the perilous regions of price regulation in the field where price determination is subject to so many varied factors which differ in each negotiation, ought to be at the least sufficiently certain and definite so that those who are directed to give obedience to the legislative mandate under pain of criminal sanctions may be apprised of the standards of conduct to which they must give obedience.

This second clause of section 3 (1) provides no such standard.

It would appear to be an obvious fact that motion pictures which are licensed in groups may be more economically licensed at lower prices than those which are licensed singly. It would also appear to be obvious that there is a variation in the position in which various

exhibitors are placed in determining whether in their business judgment they can afford to pay more for certain motion pictures separately than when purchased in combination with other motion pictures, and that how much more they could afford to pay would vary with each exhibitor and with each picture. Some exhibitors might believe they could afford to pay 150 percent in excess of the wholesale price for selection of a choice picture. Others might believe that they could not afford to pay more than 25 percent or even 10 percent. It is obvious, too, that the increase which a distributor may in the first instance ask for, and more or less insist upon as to separate pictures taken out of a group, would depend upon the ability of the distributor's salesman readily to sell the pictures not taken by other theaters in the same area and would depend also upon the varying numbers which the exhibitor offers to take or accepts. A quotation on separate individual pictures is indicative that the salesman is attempting to conclude a transaction.

How then could a salesman ever know that the price at which he at first offers or later insists upon as a condition of agreement for an individual picture in relation to the prices for the picture offered in a group, is such a price as makes his conduct a crime.

No matter how honestly or carefully a salesman would weigh these very circumstances in each individual case, he could never know that he had not violated the law as long as he offered a motion picture separately at a price higher than such motion picture in a group.

The uncertainties of section 3 may best be illustrated by supposing that one of the 14 exchanges for distribution of motion pictures present in Washington, D. C., sends a sales representative to deal with one of the exhibitors operating a theater in Washington, D. C. Under this provision the salesman, in offering the motion pictures separately and severally in comparison with the prices at which they may be offered as part of a group, must be sure that such relative prices he offers (a) do not operate as an unreasonable restraint upon the freedom of the exhibitor to select only such films as he may desire and prefer to procure; or (b) so as to tend to require the exhibitor to lease the entire block or forego the lease of any number therein; or (c) so that the prices quoted or the deal made shall not substantially lessen competition or tend to create a monopoly in production, distribution, and exhibition of motion-picture films.

Can any salesman ever be sure that the prices he quoted were such that the exhibitor felt himself free from restraint to select only such films as he may desire and prefer? Does the exhibitor himself know definitely and surely that fact? Can the salesman get into the exhibitor's mental operations to know which he desires and prefers? What makes the exhibitor desire and prefer motion pictures to be exhibited to the public as entertainment for profit, if not mainly the profit that the exhibitor believes may be derived from such exhibition, a factor which is dependent in good measure upon the price at which he is able to conclude a deal for a picture? Moreover, even if the distributor's salesman should feel finally that he has offered a price which gives the exhibitor absolute freedom to take those which he desires and prefers, can the salesman ever be sure that the price he has quoted did not tend to substantially lessen competition or tend to create a monopoly in production, distribution, and exhibition of motion-picture films? This would be a rule of law which no sales-

man could safely know is not being infringed by the prices he quoted at the time he was trading with an exhibitor for a deal as to number and prices of motion pictures to be mutually agreed upon between them.

In the third clause of section 3 the authors of the bill offer as a proposed separate Federal crime, a distinct substantive offense in itself. The basis for criminality which they have conceived is—

to lease or offer to lease films * * * in any other manner or by any other means the effect of which would be to defeat the purpose of this Act.

This cannot be a valid standard of conduct for exacting obedience from a person in advance.

This provision would virtually give unfettered discretion to a prosecutor to indict and to a jury to convict any person on the ground that he did something which had the effect of defeating the purpose of the act.

No matter how carefully and honestly a salesman conducted negotiations he could never be certain that he would not be accused of having "defeated the purpose of the act" and that he would not be sent to jail for the time prescribed in the bill.

The purposes of the act, be it remembered, are said to prohibit and to prevent the trade practice or method of distribution whereby an exhibitor is required to lease all or a specified number of an offered group of films in order to obtain any individual desired film or films in the group and extends also to the prevention of so-called "blind selling" dealt with in section 4.

Even if it is the abolition of compulsory block booking alone which is the purpose indicated, what is "block booking" and when is block booking compulsory? These are patently matters of degree dependent largely on the mind of the exhibitor party to the negotiations. If the first two clauses of section 3 (1) enjoining conduct attempted to be defined are far from clear and far from definite, how much less clear and definite is this clause? This clause sets up no standard, definite or even approximate, to which conduct must conform on pain of criminal punishment. It is without direct precedent—although it may be compared with clauses in contracts pursuant to the mandate of the German Reich Film Chamber which requires contracts to provide that such contracts "shall be interpreted in the sense of national socialism."

SEC. 4. It shall be unlawful for any distributor of motion-picture films in commerce to lease or offer to lease for public exhibition any motion-picture film over two thousand feet in length unless such distributor shall furnish the exhibitor at or before the time of making such lease or offer to lease a complete and true synopsis of the contents of such film. Such synopsis shall be made a part of the lease and shall include (a) an outline of the story, incidents, and scenes depicted or to be depicted, and (b) a statement describing the manner of treatment of dialogs concerning any scenes depicting vice, crime, or suggestive of sexual passion.

Section 4 of the bill is addressed to so-called blind selling. It provides that a distributor may not offer to contract or contract to furnish for public exhibition any motion-picture film without at the same time furnishing to the exhibitor party to the negotiations or contract a complete and true synopsis of the contents of the film, and that "such synopsis shall be made a part of the lease" (or licensing agreement for the picture).

In S. 153 (75th Cong., 3d sess.) section 4 was identical except that it also contained a provision that in case of a substantial difference

between the synopsis and the motion-picture film covered thereby, the exhibitor could cancel the contract or at his option retain the contract but claim damages for breach of warranty. This latter provision was stricken by an amendment on the floor of the Senate and is deleted from the present bill.

For any person who fails to furnish the synopsis required by section 4 or knowingly makes any false statement in such synopsis, section 5 provides fine or imprisonment or both, similar to that provided for violation of section 3.

It is to be noted that the measure makes it criminal not to furnish to each exhibitor the synopsis prescribed at the time of the making of a contract for the exhibition of a picture, notwithstanding the fact that the picture may be completed and available for exhibition and even seen by the exhibitor. This seems unconscionable.

It was forcibly impressed upon the committee by witnesses importantly engaged in the production of motion pictures that this section must hamper the successful production of any motion picture which is attempted to be licensed by contract in advance of production. Explanation was made in detail that motion pictures could not be produced artistically in order to conform to a synopsis of the scenes written before the actual production of the motion picture. There was graphic illustration in the case of the many changes made in a recent outstanding motion picture before it was produced and how it would have been impossible for the studio to achieve such success if it had been required to adhere to a synopsis of the picture which had been previously furnished to exhibitors who had made contracts for the exhibition of that picture.

A witness who appeared before the committee at the request of the Screen Writer's Guild, affiliated with the Authors' League of America, recognized as the exclusive representative for collective bargaining for all the screen writers in Hollywood, made this observation to which no person seemingly can take exception:

> The difficulties that confront motion-picture production not only in creating the finer form of the screen play but also by reason of unforeseen exigencies and unstandardized human factors that exist in no other kind of production or manufacturing make it absolutely impossible to give any exhibitor an accurate statement of what any specific screen play will contain in the way of story, characters, themes, and dialogue before the picture if finally completed. The screen play may be written to the satisfaction of everyone involved—the writer, the producer, the director, and the starring personalities—and it may have proceeded far into production only to be halted by the sudden illness or death of one of the performers or a sudden new development in public sentiment or in contemporary historical fact.

The defects pointed out must require the motion-picture production and distribution companies to forego contracts in advance in groups.

Blind selling in section 1 of the bill is described as the practice whereby "films are leased before they are produced and without opportunity to ascertain the contents of such films."

Section 4 according to the sponsors of the bill is not designed to prevent negotiations for contracts for the exhibition of films before they are produced, or before they are trade shown to the exhibitors. They have admitted that a requirement for trade showing would unduly burden the industry, set up an impossible condition for small exhibitors located in remote places, and hold back all classes of exhibitors in playing time; they have recognized that such a proposal

would be unworkable in the United States, although such is the law in England.

It has been said of the English experience as compared with the American practice:

> In England no picture can be offered for sale until the exhibitors have had an opportunity to view it. Two objections are raised to compulsory previewing. One is that only an insignificant number of exhibitors ever avail themselves of the privilege. This is undoubtedly true, though perhaps for certain purposes the fact that the opportunity was present might serve. The other objection is raised by the production department itself. Exhibitors usually desire to enter into a contract which will give them definite assurances of pictures for many months in advance, in order that there may be no chance of their screens "going dark" or to insure receipt of the certain much-desired pictures. To meet this demand, and at the same time to have these pictures available for previewing, would render it impossible to alter production plans so as to be able to capitalize on changes in public fancy. The element of timeliness would be sacrified. It is quite certain that in this country at least such a required previewing would necessitate a thoroughgoing revision of production policies. In any event it may be said that the exhibitor is in no different position from that of the man who subscribes to a magazine for a year or more in advance (H. T. Lewis, Distributing Motion Pictures (1929), Harvard Business Review, vol. 7, pp. 267, 274.)

The bill proposes as a substitute that no negotiation take place unless the distributor furnish specified information which supposedly would inform the exhibitor of the "contents" of the films for which a contract is solicited by either the distributor's sales representative, or the exhibitor or his film buyer.

It is of course appreciated that a provision which undertakes to prescribe how the "contents" of film in project or in the course of production, by a producer shall be disclosed to an exhibitor, essays no mean task. Motion pictures, although they now talk, are none the less pictures and none the less moving in their essence. Before the moving pictures are taken, developed, edited, and printed and made to move in rapid succession by projection, they hvea no "content." Even after they are taken, developed, edited, and made to move by projection, what they provide remains largely indescribable in words. Their "content" is apprehended by seeing, not by reading.

The synopsis required by section 4, supposedly designed to reveal the content of a film to an exhibitor who for good reason, wishes to negotiate a contract before the film can be seen in the "screening room" of the exchange, or on the screen of his theater, may be summarized from the text of section 4 as follows:

1. Outline of—
   - (*a*) story, and
   - (*b*) incidents depicted, and
   - (*c*) "scenes" depicted.
2. Statement describing manner of and treatment of—
   - (*a*) dialogs concerning—
     - (1) vice
     - (2) crime, or
     - (3) suggestive of sexual passion.
   - (*b*) scenes depicting—
     - (1) vice
     - (2) crime, or
     - (3) suggestive of sexual passion.

The number of scenes and incidents depicted in a motion picture runs into the thousands. Motion pictures are moving scenes which dissolve one into another. As for treatment of scenes and dialogs of vice, crime, or suggestive of sexual passion, nobody yet has been able to comprehend what the statement describing such manner of

treatment would look like in connection with any motion picture now currently being exhibited on the screens of theaters throughout the country. It is doubtful whether the draftsmen knew what it should contain.

People engaged in production have given as their honest and bona fide opinion that nothing less than what is termed the "shooting script" of a motion picture would be sufficient compliance with the synopsis prescribed, and even the shooting script might not be such compliance, for it is well known that two directors with the same shooting script would make translations of such shooting script into photographic action which would make the motion picture entirely different, dependent upon the director. Dialogs, too, in motion-picture production depend a lot upon how they are spoken and the pantomimic action of the actor with which such dialogs are spoken. What are dialogs suggestive of sexual passion or concerning vice, would be a question upon which there could be a great deal of difference of opinion; whether scenes depicting vice or scenes suggestive of sexual passion are contained in any motion picture, are matters of opinion which might differ with different producers, different exhibitors, and different viewers of the motion picture, but it is impossible to even grasp the idea of how, if it could be possible to know and identify such scenes, they could be translated into a statement in writing describing their manner of treatment in pictures that move, that would not be disputed.

According to the testimony nobody who has ever produced a motion picture or written a script for one, or had knowledge of how motion pictures are produced could have devised such a meaningless and impossible formula for a prescribed synopsis of a motion picture either to be produced or already produced. Studio officials have given it as their judgment, that six experienced film writers upon seeing a motion picture upon a screen, if they had to prepare the kind of synopsis which is formulated by this provision, would each undoubtedly deliver a writing totally different from the other.

It would be an impossible burden to furnish a "shooting script" and no shooting script, of course, describes the manner of treatment by the director of motion pictures. It is obvious that even a shooting script could not be furnished for pictures which are sought to be mutually contracted for before they reach the shooting-script or dialog stage, and after the shooting-script or dialog stage, changes must take place in the actual shooting of a film. Even plays after they have been produced, after weeks of rehearsal, are often given different "twists" in treatment, and changes in dialog and scenes are made after the production has commenced, in order to improve the performance and to achieve greater excellence. In the production of a motion picture which is so much largely a matter of direction and of cutting and editing of hundreds of feet of negative film for each foot which goes into the motion picture which is presented to the public, once the record is accepted as final, it is impossible of change. There is therefore necessity for changing from the shooting script as the actual shooting takes place.

The provisions of this section are unnecessary, since exhibitors contract in advance of production because they wish to do so, and the choice they make is based on other factors than what is prescribed in the proposed statutory formula for the required synopsis.

There is no suggestion that "blind selling" or "blind buying" by the exhibitor is "compulsory." The label "compulsory" is omitted from its description. Exhibitors, if they wished to, could now limit their contracts for motion pictures to those motion pictures which have already been produced.

They negotiate for pictures before they are produced or conclude a contract before seeing them because of many legitimate reasons. One of the main reasons is to insure prompt delivery of a picture upon release to take advantage of something new and of the publicity that emanates from the studios and from the producing and distributing companies' publicity departments at the time of the release of a new motion picture. After all, what the exhibitor sells is something intangible, namely entertainment. What he would like to be assured of most of all when he makes a contract for motion pictures is that they will entertain. He has come to rely upon agencies within the industry even more than official censorship bodies or penal statutes prohibiting the transportation or showing of lewd or indecent motion pictures, that the motion pictures will not be obscene or vicious. He depends in large measure for the entertainment value of a motion picture, upon the amount and kind of publicity done by the distributor in connection with the motion picture. He cannot tell from a mere story of a plot how much entertainment value the picture is going to have. He sometimes can predict the entertainment value of pictures with certain stars or directed by certain directors.

As one exhibitor, in connection with this provision of the bill has pointed out:

> I challenge any man alive to read a synopsis of It Happened One Night or Mr. Deeds Goes to Town and faintly sense the charm or distinction of these pictures.

A distributor's blind selling or an exhibitor's blind buying of motion pictures, in the case of the pictures of producers of established reputation contracted for by exhibitors of experience and competence, is no more blind than is a commission to an author or a composer to write a novel or compose a symphony.

The requirement of the prescribed synopses under criminal penalties, applies in the case of motion pictures produced, reviewed in the press, and seen by the exhibitor.

How much better can an exhibitor be given information of the contents of a motion picture than by providing opportunity for the exhibitor to see the motion picture? Yet by this section even if the motion picture is finished at the time of the negotiation and the exhibitor is given an opportunity to see it and thus learn of its contents, the distributor must still furnish a prescribed "complete and true synopsis" as summarized above.

This appears to be contrary to the asserted purpose of this section carried as a clause in the section itself that the object is to permit the exhibitor to make an informed selection, but there is not a word in the entire section which eliminates the duty of the distributor (and the corresponding duty of the exhibitor) not to negotiate for a contract for a motion picture, even if the exhibitor has just finished viewing the picture, unless the distributor furnishes the synopsis required.

In the formula prescribed for the synopsis there are the words "depicted or to be depicted" which indicate that it contemplates that with a finished motion picture available for viewing, reviewed in the

trade papers, even seen by the exhibitor himself, the distributor must, under pain of imprisonment in the penitentiary, furnish the kind of synopsis described. It is this provision which has given cause to persons in the industry to proclaim that the measure sought to be enacted by this section of the bill is punitive in purpose and intent.

The producer of motion pictures is interested in knowing what types of motion pictures will appeal to the public. He must make his estimates many months in advance of production since in the selection of the scenario and cast, and in the actual making of the picture, considerable time is consumed. Because of the mutual advantages to be derived, both an exhibitor and a distributor will have made a contract for the motion picture before it is finished, yet before it is finished the producer will make countless changes in the story as suggested by the author, and in treatment as the director discards after previews some treatments and substitutes others by "retakes." A statutory regulation which permitted an exhibitor to cancel the contract if the picture differed from a prescribed true and complete synopsis recounting scenes and incidents, must have the effect of preventing the making of such changes as would seem to be required in the course of production.

The producer would always be under the fear that, if the motion picture he produced did not in all respects correspond to the synopsis furnished by his distributing agency at the time of negotiation for a contract, he would be accused of having made a knowingly false statement in the synopsis, and therefore liable to incarceration. Pictures remade after audience-reaction tests would have to be foregone. Spontaneity in a creative art would be stifled. The commercial conduct of the industry underlying the art would be so restricted that both might perish.

The destruction and injury to the industry apprehended by those engaged therein might conceivably be justified if there were present evils which subject the American public to vicious or immoral motion pictures and the measure had relation to the eradication of such evils. At the hearing before the subcommittee the sponsors of the measure and all those who appeared in support thereof were in unanimity of agreement with the opponents of the measure upon the point also that it was not desirable for the Federal legislature to impose a bureaucratic censorship to control the contents of American motion pictures. There was also agreement on all sides that American motion pictures have had steady and continuing improvement in their quality morally, artistically and educationally. When the measure was reported out of the Senate Committee on Interstate Commerce of the second session of the Seventy-fourth Congress (S. 3012, June 1936) in the report of the committee there was reference to the improvement in the quality of motion pictures in the 2 years prior to its report. The report was dubious whether such improvement could be expected to be continued or maintained. Three additional years have elapsed and in all fairness it must be stated that improvement has been maintained and has continued progressively.

It is true that the American public is entitled to choose even as between good pictures, but it cannot be said upon the record made at the hearings that a legislative finding would be warranted that the American public is anywhere prevented from choosing among

good pictures or from making its choice effective by pressure upon the exhibitors of motion pictures.

Special emphasis at the hearings was laid upon the efforts of the responsible establishments in the industry to govern motion-picture production at its source to the morals of the American public as expressed by the public-welfare groups and in cooperation with such groups.

The relation of the measure to the morals of motion pictures is advanced in a tenuous hypothesis which argues that exhibitors, when approached by public-minded groups in any community to be brought to task for a picture claimed to be unsuitable, present the alibi that they were forced to play such picture because they had contracted for it in a block without knowledge of its contents and could not be relieved of exhibiting the motion picture except on payment of the agreed price therefor, which they could not financially afford, and that such alibi stands in the way of freedom of community selection. It seems too large a penalty to pay entirely to disrupt an important part of the Nation's economy, aware of its responsibilities, in order to isolate an exhibitor from what is frankly acknowledged to be an alibi so as to expose him to a higher degree of local responsibility. Yet, in any event, the industry, according to testimony at the hearings, has undertaken presently to provide higher percentages of selectivity from their annual output contracts than now obtains, and furthermore to cancel any contract for any motion picture which is locally morally offensive. This arrangement ought to be sufficient amply to detach exhibitors from their much abused alibi and permit them to be held accountable to the local communities in which they operate for the motion pictures exhibited by them, which could have been voluntarily canceled by them under the arrangements described.

Prominent persons foremost among the sponsors of this measure at the last session of Congress have addressed the committee, stating their desire now that the industry be given the chance of handling these problems without legislation.

After careful study we cannot recommend a bill which it is conclusively shown would not work out in actual practice, and which would do injustice to one of America's most important and essential arts and industries.

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